SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 716

GENERAL TIME CORPORATION,

Petitioner,

—against—

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually, and as Chairman of the INDEPENDENT STOCKHOLDERS' COMMITTEE OF GENERAL TIME CORPORATION and AMERICAN INVESTORS FUND, INC.,

Respondents.

BRIEF OF RESPONDENTS TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN AND OSCAR KIMELMAN IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement

The instant action is one of several which have arisen out of an election contest between the management of petitioner, General Time Corporation ("General Time"), and an Independent Stockholders' Committee (the "Com-

mittee") supported by those respondents on whose behalf this Memorandum is submitted.

Proxies were solicited by both factions in March and April 1968, and on April 22, 1968 the General Time stockholders' meeting was convened. On that date, the stockholders' ballots were cast and the meeting was thereupon recessed to permit the inspectors of election to count the vote and prepare their report. By reason of stays issued in other litigation the meeting has not yet been reconvened to continue the transaction of business. Preliminary indications are, however, that the Committee's candidates were elected by a margin of some 97,000 votes. As of this writing, despite the passage of seven/twelfths of the term to which the Committee's slate was apparently elected, management still remains in office.

Petitioner (*i.e.*, management, suing in the name of the corporation) filed its complaint in the United States District Court for the Southern District of New York on April 5, 1968 in the middle of the proxy solicitation campaign. The complaint charged that the Committee's proxy statement, both in what it said and in what it did not say, was false and misleading and violated Rule 14a-9(a) of the Proxy Rules (17 C.F.R. 240.14a-9(a)). Petitioner in the District Court twice moved for, and was twice denied, preliminary injunctive relief. On appeal, the United States Court of Appeals for the Second Circuit specifically found both that the Committee's proxy statement was not false or misleading and that the alleged omissions (which petitioner wants further reviewed in this Court) were not material; and accordingly it affirmed (2-1) the District Court's findings to the same effect.

In reaching its conclusion of immateriality, the Court of Appeals noted that its own view to that effect was reinforced by the fact that, although the additional information had been disclosed to petitioner in ample time, petitioner never made reference to it in its own proxy solicitation literature. The Court of Appeals noted that petitioner's "failure to correct alleged misstatements or rectify claimed omissions is some evidence that it does not regard them as material. . . ." (Pet. Appx. A, at 6a)* As to one such claimed omission, the Court of Appeals noted that "the point is apparently deemed more important for litigation than it was for information." (Pet. Appx. A, at 8a)

Petitioner argues that the Court of Appeals should not have decided what was or was not material but rather should have required inclusion in the Committee's proxy statement of all additional matters that "may be material" (Pet. 12).

Facts

On February 19, 1968, respondent Franz G. Talley ("Talley"), the president of Talley Industries Inc. ("Industries"), met with members of the management of General Time and expressed Industries' desire to negotiate a merger with General Time. Management considered the matter but decided to fight against any such proposal and so informed Talley. Five days later (in a companion case) General Time sued Industries, American Investors

* Refers to the pages in the appendices to the petition for certiorari. References to pages in the petition itself are indicated herein by "Pet. ——".

Fund, Inc. (hereinafter the "Fund," a registered investment company), and others, citing Fund's ownership of more than 5% of Industries' common stock and charging violation, *inter alia,* of § 17(d) of the Investment Company Act of 1940 (hereinafter the "Act"). General Time sought to enjoin Industries, the Fund and the other defendants from voting their stock in General Time.*

Industries' demand for a list of stockholders of General Time was refused and Industries brought suit in the Chancery Court of Delaware. After time-consuming attempts to conduct oral examination on issues which the Chancery Court (and subsequently the Supreme Court of Delaware) ruled were irrelevant, General Time finally defaulted, an order was entered against it and management was forced to deliver a stockholder list to Industries. (One result of these tactics was to give management a two-week lead during which only its proxy material was before the stockholders.)

In March 1968, during the pendency of the stock-list litigation, the Securities and Exchange Commission (the "SEC") commenced an investigation (pursuant to its statutory authority under § 42(a) of the Investment Company Act) into General Time's charges that Industries and the Fund had violated § 17(d) of the Act and the SEC's Rule 17d-1 thereunder. These charges were made on the basis of the following facts:

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* General Time's complaint in that action was dismissed by the District Court. That dismissal was affirmed by the Court of Appeals. (See Pet. Appx. A, at 10a-11a.) General Time has informed the Court of Appeals that it does not intend to petition for certiorari from that dismissal.

On December 29, 1967, Talley telephoned George Chestnutt ("Chestnutt"), President of the Fund and told him that Industries had purchased stock in General Time, that it intended to buy more and that it had in mind the possibility of a future merger with General Time. Talley asked whether Fund might also wish to buy some General Time stock. Chestnutt replied that if the Fund did so, it would maintain its own independence and would make no agreements as to voting, disposition, etc. After further consideration of the matter Chestnutt determined that Fund should take a position in General Time. He was motivated both by study of the company's earnings and by a belief that if Industries sought a merger the stock would rise as a result of that offer or of others it might stimulate. (See *SEC* v. *Talley Indus., Inc.*, 399 F.2d 396, at 399 (2d Cir. 1968), the companion case to which Judge Friendly alluded in the introduction to his opinion.) Fund subsequently did buy 210,000 shares at an average price of $28.49 per share. Industries' 257,937 shares, most of which were acquired after Fund had completed its purchases, were acquired at an average cost of $36.76 per share.

By reason of the Fund's ownership of over 5% (*viz.*, 9%) of Industries' outstanding voting stock, Industries is an "affiliated person" of the Fund. (See § 2(a)3(B) of the Act.) Section 17(d) prohibits an affiliate from effecting any "transaction" in which the registered investment company is a joint or joint and several participant, in contravention of such rules as the SEC should prescribe "for the purpose of limiting or preventing participation by such registered . . . company on a basis different from or less advantageous than" that of the affiliate. Rule 17d-1 re-

quires application to and approval by the SEC of any such proposed transaction prior to its effectuation. The SEC's investigation was into the question of whether the acquisition by Industries and the Fund of their respective holdings in General Time shares constituted a "transaction" in which they jointly or jointly and severally participated, and if so whether the Fund's participation was on a basis "different from or less advantageous than" that of Industries.

During March, Industries organized and sponsored the Independent Stockholders Committee and the Committee submitted its proposed proxy statement to the SEC for clearance. On March 25, Industries' counsel received a conference telephone call from four members of the Commission's staff: Ralph Hocker, the staff member in charge of clearing both sides' proxy solicitation material in the General Time contest; John Dudley, Associate Director of the Division of Corporate Regulation (the division in charge of investment company regulation), who subsequently argued the Commission's case before the Court of Appeals in the companion action referred to above (see 399 F. 2d 396, at 398); Sidney Mendelsohn, the Commission official in charge of the investigation which had been conducted by the SEC; and Richard Bandler, the associate regional administrator in New York City who actually conducted the investigation. The discussion concerned the facts developed by the investigation and the Committee's preliminary proxy statement. The staff of the Commission advised Industries' counsel that the SEC would not clear the Committee's proxy statement unless Industries filed an application with the Commission for approval of what the staff considered a joint transaction under § 17(d) of the Act.

On March 26, Industries did file such an application, which was later joined in by the Fund. The application, as the court below found, "made a detailed statement of the facts" (Pet. Appx. A, at 3a) but disclaimed that the events described therein fell within the ambit of § 17(d) of the Act. The Committee's preliminary proxy statement as originally filed with the Commission was amended to include reference to the application and the Commission then "cleared" the Committee's proxy statement and it was thereupon mailed to the stockholders of General Time. A copy of the application was immediately given to petitioner, General Time.

The issues which evolved in the proxy contest were many which are usual in such matters and some which are not. They included General Time's poor earnings record; management's recently executed long-term employment contracts; Industries' desire to effect a merger, its sponsorship of the Committee and prospective conflict-of-interest problems; management's negligible ownership interest; the individual Committee members' ownership (excluding the three candidates who were members of Industries' Board) of 66 times as many shares of General Time as of Industries; the poor performance of General Time's stock in the marketplace; management's belated increase, in late February, of the dividend rate; management's distrust of the Committee and the Committee's distrust of management; the comparative business credentials of the candidates; and management's last-minute proposed bail-out merger with a juke-box and vending machine company from Illinois (Seeburg Corp.).

On April 5, 1968, petitioner filed its complaint below and immediately moved for preliminary injunctive relief, charg-

ing that the Committee's proxy statement violated Rule 14(a)(9). Its motion was based on a broad array of charges, all found to be without merit by the District Court. (See Judge Tyler's Opinion of April 11, 1968, Pet. Appx. P, at 21a-23a.)

On April 16th, 17th and 18th, hearings on Industries' § 17(d) application were had at the SEC. On April 19th the Commission issued its Memorandum Opinion and Order Denying Application (Pet. Appx. E, at 35a-39a) in which it concluded that the transactions described in Industries' application did fall within the ambit of § 17(d) and that since no application had been filed prior to effectuation of the transaction Industries had violated the Act (Pet. Appx. E, at 38a). Although making no finding as to whether the Fund's participation had been on a basis "different from or less advantageous than" that of Industries—the Commission could hardly have done so in light of the fact that the Fund had obtained its General Time stock at a price about 70% of what Industries paid—the Commission declined to grant retroactive approval.

The following Monday, April 22, 1968, four hours before the annual stockholders' meeting was to commence, petitioner applied again to the District Court for preliminary injunctive relief. Management wanted time to publicize the Commission's decision, and in order to obtain such time again charged that the Committee's proxy statement had been false and misleading, this time because it had not set forth more detail with respect to the § 17(d) application. On the basis of all of the facts before the court, which included voluminous proxy materials, newspaper reports, testimony, etc., Judge Tyler again determined that

the Committee's proxy material had not been false or misleading. Focusing on the reference in the Committee's proxy statement to Industries' § 17(d) application, Judge Tyler noted:

> "Of course, it didn't prognosticate that Talley [Industries] and the Fund would be found in violation of Section 17, but I don't think that anybody under Section 14 could have reasonably insisted that Talley make such a prognostication." (Pet. Appx. C, at 30a)

Judge Tyler declined to issue injunctive relief.

Accordingly, the stockholders' meeting of General Time was duly held that day (April 22nd) and the ballots were cast. The preliminary (unofficial) count indicates a plurality of some 97,000 votes for the Committee's nominees. On May 1st, before the count could be officially announced, the SEC brought suit against Industries and Fund on the basis of its determination that § 17(d) had been violated, seeking, *inter alia*, an order that Industries and Fund withdraw the votes each had cast in favor of the Committee's slate on April 22nd. Proceedings were expedited and plenary trial was had before District Judge Wyatt on May 22 and 23. On June 24, Judge Wyatt ruled that he was not bound by the administrative determination and he, too, concluded, as had Industries, that the events in question did not violate § 17(d). The Court of Appeals reversed and remanded because it deemed itself concluded by the finding of the SEC; but in so doing, the Court of Appeals nonetheless went on to find that § 17(d) had rarely been construed; that no case had ever applied it to a situation such as this; that conscientious counsel could well have believed the Section inapplicable; and that Industries and

Fund could not be regarded as deliberate flouters of the law. Hence it concluded that punitive relief that would disfranchise them was not appropriate; that § 17(d)'s purpose was to protect the stockholders of Fund, not General Time's management's interest in maintaining itself in office, and that the stockholders of the Fund had not yet been hurt although they might be if the parties were deprived of their rights to vote (399 F.2d at 405-06).

In the instant proceeding, petitioner seeks review on certiorari of the denial of its applications for injunctive relief in its Rule 14a-9 case, arguing that the Court of Appeals should not have decided what was or was not material but rather should have required inclusion in the Committee's proxy solicitation literature of additional matters which might have been material. Of the plethora of alleged misrepresentations and omissions charged against the Committee by petitioner below (see, *e.g.*, Pet. Appx. B), there remain only the charges that respondents' proxy materials failed to disclose that Industries had violated § 17(d) of the Investment Company Act and that respondents' proxy materials did not pick up what petitioner had, as early as February 24th, put in its § 17(d) complaint—that Fund owned over 5% of Industries' outstanding stock.

ARGUMENT

I.

The Court Below Correctly Found that the Committee's Proxy Statement Was Not Misleading and Further Correctly Found that the Alleged Omissions Were Not Material.

Rule 14a-9(a)* prohibits the solicitation of proxies by means of a statement containing omissions of material fact necessary in order to make the statements therein not false or misleading. In order to run afoul of Rule 14a-9(a), it is thus necessary (1) that the omitted facts complained of be material *and* (2) that their inclusion be "necessary in order to make the statements therein not false or misleading."

The Court of Appeals correctly concluded—as had the District Court—that the Committee's Proxy Statement was not false or misleading: "We fail to see how the details concerning the discussions between Industries and Fund that were omitted from the proxy statement were 'necessary in order to make the statements therein not false or misleading.'" (Pet. Appx. A, at 7a) Petitioner nowhere disputes the correctness of that determination. The court's unchallenged determination that the proxy statement was not false or misleading is dispositive of the instant case, rendering moot any issue as to whether details not included were or might have been material.

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* The text of Rule 14a-9(a) is set out in Respondent's Appendix hereto. Petitioner's Appendix F contains a printer's error which omits the eight key words.

Turning nevertheless to the question of materiality, petitioner argues that the requirement should be that whatever "may be material" should have been required to be included in the literature sent to the stockholders (Pet. 12) even though neither the Committee nor management (nor, for that matter, the SEC) deemed the additional facts in question below to be worth publication during the contest itself.

How the details of the events above related could have been material to the other stockholders of General Time in the election contest, petitioner does not state. The Committee did not include them, although the court below was of the view that, if the further details had any relevance at all, they would more likely have tended to help the Committee than the petitioner which protests their omission. Petitioner did not include them in its solicitation literature and does not explain why, if they were as important as petitioner now says, it did not publish the facts itself. Petitioner's contention that it did not learn the facts in time, that is, not until they "were only reluctantly disclosed in the course of the evidentiary hearing before the SEC" (Pet. 17), is not true. A "detailed statement of the facts" (see Pet. Appx. A, at 3a) was contained in Industries' application to the SEC, and the court below specifically found that petitioner had knowledge of them (Pet. Appx. A, at 6a).

Despite having chosen to make no reference to the additional information itself, petitioner contends that the court should have granted its application. The appropriate definition of materiality, petitioner argues, would be a definition that included all that "may be material" (Pet. 12). But one does not define a word by modifying

it. That which "is material" is only a part of that which "may be material," for the latter includes not only matter which on final analysis is material, but also matter which on final analysis is not. Petitioner would have the courts abdicate the responsibility which is theirs under Rule 14a-9 (a) to make that final analysis.

A doctrine calling for preliminary injunctive relief to be granted in cases where the moving party could do no more than establish doubtful materiality would be the converse of the existing rule which requires a "clear showing" or a "clear and plain case." *Santos* v. *Bonanno*, 369 F.2d 369, 370 (2d Cir. 1966); *Dunn* v. *Decca Records, Inc.*, 120 F.Supp. 1, 3 (S.D.N.Y. 1954).*

Rule 14a-9(a) does call for the court to make the analysis of materiality and the majority below did make that analysis on the basis of its evaluation of all of the facts.

The standard used below was whether, taking a "properly realistic view," there was a "substantial likelihood" that the omitted fact would have "led" a stockholder to vote one way rather than the other (see Pet. Appx. A, at 6a). The cases cited by petitioner (see Pet. 12-13) do not apply a different test at all, although they vary, from one to the other, in form of expression. Thus, in *Richland* v. *Crandall*, 262 F.Supp. 538 (S.D.N.Y. 1967), the court spoke of facts which "could normally be expected to lead

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* On appeal petitioner has the further burdens of showing that the lower court committed "clear error" when it found that the additional facts were not material (Fed. R. Civ. P. 52(a); *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495-96 (1950); *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960)), and that it abused its discretion when it declined to grant injunctive relief in the circumstances. *Meccano, Ltd.* v. *John Wanamaker*, 253 U.S. 136, 141 (1920).

a reasonable stockholder not to vote in favor of the proposal" (262 F.Supp. at 553) or which "would normally be expected to influence a reasonable stockholder in voting on the proposal" (*ibid.*). In *Western Oil Fields, Inc.* v. *McKnab,* 232 F.Supp. 163 (D. Colo. 1964), the court spoke of facts which "reasonably could have influenced, shareholders to give their proxy in a situation where they would not have done so had the alleged fraudulent statement or statements not been made" (232 F.Supp. at 166). Many of the authorities petitioner cites contain the requirement that the additional facts "would influence," unqualified by such phrases as "substantial likelihood," "could normally be expected" or "reasonably could," and those cases could therefore be viewed as requiring a stronger showing of materiality than the test applied below. *Walpert* v. *Bart,* 280 F. Supp. 1006, 1011 (D. Md. 1967), *aff'd,* 390 F.2d 877 (4th Cir. 1968); *Miller* v. *Steinbach,* 268 F.Supp. 255, 273-74 (S.D. N.Y. 1967); *Evans* v. *Armour & Co.,* 241 F.Supp. 705, 709 (E.D. Pa. 1965); *Phillips* v. *United Corp.,* CCH Fed. Sec. L. Rep. ¶90,395, p. 91,072 (S.D.N.Y. 1947); 2 Loss, Securities Regulation 917-18 (2d ed. 1961); *cf. Dunn* v. *Decca Records, Inc.,* 120 F.Supp. 1, 2 (S.D.N.Y. 1954); *SEC* v. *Okin,* 58 F.Supp. 20, 24 (S.D.N.Y. 1944). In *SEC* v. *Henwood,* CCH Fed.Sec.L. Rep. ¶91,125 (S.D. Cal. 1961), *mod. and aff'd,* 298 F.2d 641 (9th Cir.), *cert. denied,* 371 U.S. 814 (1962), the court spoke of "essential facts which may influence." *Id.* at p. 93,712.

But these different means of expression do not express different concepts, and petitioner's argument is a quibble over words where meanings do not differ. In any given case the issue is really whether equity requires judicial intervention, and both courts below have found that the facts at bar did not warrant injunctive relief.

II.

The Court of Appeals' Passing Reference to the SEC's Lack of Objection to the § 17(d) Aspects of the Committee's Proxy Statement Was Not Erroneous "Reliance."

Petitioner asserts that the Court of Appeals "relied upon" the SEC's clearance of the Committee's proxy materials and that this was error warranting reversal (Pet. 14). Far from relying on the Commission's position, the Court of Appeals made its own determination that the additional information was immaterial. The court then wrote that "Finally, although this makeweight is scarcely needed, we think that, despite Rule 14a-9(b), some force can be given to the SEC's clearance of the Proxy Statement in a case such as this where the omissions were of facts well known to it as a result of the contemporaneous Rule 17d-1 application." (Pet. Appx. A, at 8a)

Actually, not only were the facts well known to the SEC by reasons of Industries' § 17(d) application (which the court below described as containing a "detailed statement of the facts" (Pet. Appx. A, at 3a)), but also by reason of the SEC investigation into the matter in early March which had led to the conference telephone call (referred to *supra*, p. 6) wherein both the SEC official responsible for clearing both sides' proxy solicitation materials and the SEC officials in charge of investigation and enforcement of § 17(d) matters participated. For the Court of Appeals to have completely ignored these circumstances would have been unrealistic.

The court's conclusion that the SEC's consideration of the Committee's Proxy Statement was of some significance

does not conflict with this Court's opinion in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964). In *Borak,* the question was whether or not a private right of action should be allowed to enforce the Proxy Rules as a supplement to the Commission's responsibility for enforcement of those Rules. In that case, this Court was guided by the SEC's report (as *amicus curiae*) that, in view of the great number of proxy statements which confront it, the SEC must ordinarily take factual representations contained therein at face value. For that reason (among others), this Court held that "Private enforcement of the proxy rules provides a necessary supplement to Commission action." 377 U.S. at 432. But as this Court further noted, the SEC's disavowal of responsibility for knowledge was qualified, *i.e.,* facts were accepted by the Commission at their face value "unless contrary to other material on file with it," 377 U.S. at 432. We do not suggest that because the Commission had "other material" (to say the least) "on file with it" relating to the § 17(d) matter, the Commission's failure to object to the Committee's Proxy Statement is determinative. See *Subin* v. *Goldsmith,* 224 F.2d 753, 774 (2d Cir.), *cert. denied,* 350 U.S. 883 (1955) and *Millimet* v. *George F. Fuller Co.,* CCH.Fed.Sec.L.Rep. ¶91,570 (S.D.N.Y. 1965). But it would be absurd not to give "some force" to this "makeweight" (as it was referred to below, see Pet. Appx. A, at 8a). See *Kauder* v. *United Bd. & Carton Corp.,* 199 F.Supp. 420, 423-24 (S.D.N.Y. 1961); *Dunn* v. *Decca Records, Inc.,* 120 F.Supp. 1, 2 (S.D.N.Y. 1954). See also *Sherman* v. *Posner,* 266 F.Supp. 871, 874 (S.D.N.Y. 1966); *Mack* v. *Mishkin,* 172 F.Supp. 885, 888 (S.D.N.Y. 1959); *Shvetz* v. *Industrial Rayon Corp.,* 212 F.Supp. 308 (S.D.N.Y. 1960).

III.

There Was No Shifting of Any "Burden of Disclosure" by the Court Below.

Petitioner alleges that the Court of Appeals improperly "shifted" to it the "burden of disclosure" of facts that petitioner claims should have been disclosed by the Committee (Pet. 16-18). Petitioner's reference is to the Court of Appeals' reasoning that the failure of petitioner in its own proxy materials at any time to correct what it now claims were misleading statements or omissions is "some evidence" that petitioner did "not regard them as material" (Pet. Appx. A, at 6a). This was no "shifting" by the Court of Appeals of any burden of disclosure onto petitioner, but instead merely the drawing of an inference plainly suggested by petitioner's course of conduct.

Petitioner seeks to escape the implication of its own nonaction by the oblique statement that it did not know "all the facts" until later (Pet. 17). This argument is specious. In addition to whatever information petitioner had when it filed its own § 17(d) complaint on February 24th, petitioner had in its possession from first to last in the proxy contest—that is, from the day the Committee's proxy statement first went out (March 27) through all the period of subsequent mailings by both sides in the ensuing 3½ weeks —a copy of Industries' § 17(d) application, a document which, the Court of Appeals found, contained "a detailed statement of the facts" (Pet. Appx. A, at 3a). Yet during this entire period petitioner mentioned none of these facts. Its belated protest evidences, as the Court of Appeals found, management's belief that the issue is "apparently deemed more important for litigation than it was for information" (Pet. Appx. A, at 8a).

CONCLUSION

Wherefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CONCLUSION

Wherefore the petition for a writ of certiorari should be denied.

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APPENDIX

SEC Rule 14a-9(a), 17 C.F.R. 240.14a-9(a)

False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.